BOARD OF COUNTY COMMISSIONERS

via hand delivery

301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-4710

January 13, 2004

Nancy G. Linnan, Esq.
Carlton Fields, et al.
Post Office Drawer 190
Tallahassee, Florida 32302-0190

Re: Leon County Ordinance No. 03-09

Dear Ms. Linnan:

This letter is written in response to your attached memorandum regarding Leon County Ordinance 03-09, and the application of your client, WalMart, for re-granting of vested rights under that ordinance. This letter will address each point raised in your memorandum, in the same order.

On your first point, legal principles of equitable estoppel do not apply to your client's application, we completely agree. The ordinance adopted by the Board of County Commissioners (Board), clearly creates alternative criteria for re-granting vested rights that do not rely upon proving reliance (on behalf of the applicant) on some act or omission of the government. Our office has been clear about the meaning of this section even prior to its adoption by the Board. We have met with Board members since concerned citizens have raised this issue and explained the interpretation to them.

On the second point, the plain language of the ordinance relates to the previously approved conceptual plan of development, we can offer additional clarification. We agree with your legal argument and supporting case law, that any interpretation of the ordinance must be avoided that would lead to an absurd result or render the ordinance meaningless. Certainly requiring the applicant to demonstrate how all the previously approved conceptual development would meet current environmental regulations would be absurd and an exercise in futility. Such a requirement must be avoided. However, in looking at the language of the ordinance, you will note that the ordinance speaks to the "unbuilt phase or phases" of the previously-approved conceptual plan of development. For example, in subsection (2)(a), the ordinance requires a demonstration that adequate public infrastructure is available to support the anticipated off-site impacts of the "unbuilt phase or phases" of the previously approved conceptual development, and specifically mentions transportation impacts. After reviewing the history of the ordinance adoption, and considering its plain language, we conclude that the ordinance requires the applicant to provide data regarding the impacts of the previously-approved, yet unbuilt phases, of the development, in

order for the County to adequately assess capacity to absorb a new plan of development. As stated in your memorandum, and throughout previous County Commission and staff meetings on this project, your client intends to "transfer" the intensity of development, along with associated traffic and other impacts of the development, from the unbuilt phase to the parcel(s) on which the Sam's Club currently exists, to allow for redevelopment of that parcel at a greater intensity. The ordinance requires some analysis of the impacts of what could have been built on the unbuilt phases, in order to accurately transfer that capacity to the redevelopment proposal for the amendment to the overall planned unit development.

On issue three, that revesting of the old plan of development not occur before approval of the plan for redevelopment, we are also in agreement. As you are aware, many residents in the area are concerned with the impacts of the proposed redevelopment and have brought those concerns to the Board. A blanket revesting of the old plan of development, based solely on an analysis of its impacts at buildout and the ability of current infrastructure to absorb those, would not be sufficient. We agree with a recommendation to the Board to grant revesting conditioned upon completion of the County's site and development plan approval process for the redevelopment of the Sam's site. That will be staff's recommendation to the Board at the public hearing scheduled for January 27, 2004.

On the final issue, what specifically should your client submit in order to comply with the ordinance, we request the following. As discussed above, the ordinance requires an analysis of the impacts of the previously-approved, yet unbuilt, phases of the PUD. This case particularly hinges on the transfer of transportation impacts and allowable density or intensity of development from the unbuilt phase (Hastings tract) to the site for redevelopment of the existing Sam's Club. Therefore, your client should submit to County Growth and Environmental Management trip generations and traffic counts that would have been generated by development of the Hastings tract as previously approved. Second, your client should submit calculations of the specific density and/or intensity of development approved for the Hastings tract and an analysis of the transfer of that density and/or intensity for the redevelopment of the Sam's Club site. Growth and Environmental Management staff will then analyze that data and work with your client on a recommendation to the Board. If all analysis is not complete before the January 27 meeting, we will ask the Board to continue the public hearing again to a date certain.

Your memorandum also requests a list of the requirements that the redesigned site must meet. Since the site will be subject to the County's site and development plan approval process, the specific requirements are outlined in Division 4 of

Article XI of the Leon County Code. Of course, if vesting of the PUD from the Comprehensive Plan is accomplished, the concurrency requirements will not apply. However, your client would need to demonstrate that the proposed redevelopment plan would not generate any additional off-site traffic than would be generated by the built and unbuilt components of the Gwynndale PUD. And, of specific concern to many residents and County officials, your client must demonstrate that the proposed redevelopment will comply with all current EMA regulations. This compliance demonstration requires the completion of an approved natural features inventory (NFI) and environmental impact analysis (EIA).

In summary, we recommend that your client amend its current request for re-vesting. The amended Board request would be for a time certain, conditional re-vesting of the unbuilt component of the Gwynndale PUD. The primary condition of the re-vesting would be that your client applies within a time certain period for an amendment to the Gwynndale PUD that reflects the proposed plan of redevelopment and demonstrates compliance with current County EMA. This approach would require completion of the County's Type D site and development plan review process. This alternative would allow review of the proposed redevelopment plan for the Gwynndale PUD by staff and the Planning Commission, with final review and determination by the Board of County Commissioners. Additionally, this option would provide the appropriate process as well as forum for your client to demonstrate that the PUD redevelopment proposal can comply with the County's EMA. This alternative would also address the concerns and issues noted by the public as well as the Board at previous Board meetings on your client's re-vesting request. Furthermore, this approach is supported by staff.

If you have any questions, please contact the County Attorney's Office.

Sincerely yours,

OFFICE OF THE COUNTY ATTORNEY
LEON COUNTY, FLORIDA

Suzanne H. Schmith

Suzanne H. Schmith, Esq.
Assistant County Attorney

SHS:sl

CARLTON FIELDS

MEMORANDUM

To: Herb Thiele — Via Hand Delivery
Suzanne Schmith — Via Hand Delivery
David McDevitt — Via Hand Delivery

From: Nancy Linnan

Date: December 4, 2003

Re: Legal Issues Concerning Leon County Ordinance No. 03-09 (the Re-vesting Ordinance)

Suzanne and David have made me aware of legal issues involved in the implementation of this ordinance. These have resulted in David's letter of November 25. I certainly can understand the questions; the ordinance itself is not always a model of clarity. Additionally, I think we were remiss in not sitting down with you before Kimley Horn submitted the current application in order to establish more clearly the mechanics of how this would work. Still, I don't think it is too late and, in addressing those issues I am aware of, this memo makes some suggestions as to how this re-establishment of vesting on the Gwynndale PUD should work.

First, however, I have become aware of four issues that require our immediate response:

Issue 1

I have heard it argued by at least three people that the application may not be approved unless the applicant demonstrates that the County is equitably estopped from not vesting the project. Of course, that's my legal shorthand for the arguments. What they are saying is that we must show that the owner acted in good faith upon some County act or omission or made a substantial change of position or incurred extension-ive? obligations so that it would now be inequitable or unjust not to reestablish vested rights. A corollary for this is that the applicant needs to demonstrate that a substantial portion or all of the infrastructure has been installed so as to retain vesting. These are the criteria for vesting established in Section (1) of the ordinance.

Meeting those requirements is not necessary under the portion of the ordinance under which the Wal-Mart application was filed. A new section was added to the ordinance in April which states, among other things:

> (2) [n]ot withstanding [sic] paragraph (1), re-vesting for conceptually approved phase or phases of planned unit developments shall be based only on the following criteria:
>
> a. The ability of the applicant to demonstrate that adequate public infrastructure is available to support the anticipated off-site impacts such as but not limited to transportation, storm water and environmental impacts associated with the unbuilt phase or phases of the previously approved conceptual plan of development; and,
>
> b. The ability of the applicant to demonstrate that the unbuilt phase or phases of the development will be compatible with the existing or planned land uses that are adjacent to or in close proximity to the proposed development including the internal cohesiveness, compatibility, and spatial integration with the developed portions of the project as established in the previously approved master plan for the planned unit development; and,
>
> c. The ability of the applicant to demonstrate that the development of the unbuilt phase or phases of the previously approved conceptual planned unit development will comply with the protection of conservation and preservation features that may be onsite consistent with the provisions of the Comprehensive Plan and Land Development Code.

In other words, the prior standards for re-vesting do not apply and, since this phase deals with the re-vesting of a conceptually approved phase or phases of a PUD, the three new criteria are the only ones that apply.

Issue 2

We have also heard an argument that the plain language of the ordinance does not allow an alternative plan but rather that the three criteria under subsection (2), as cited above, all relate to the "previously approved conceptual plan of development." According to this theory, in order to become re-vested, one must show that the original PUD and its associated impacts as set forth in the ordinance would meet the criteria.

We have all agreed that this is impossibility because the original plan or even the constructed portion of the original plan is precisely what we are all trying to avoid. The original plan does not protect, among other things, stormwater and environmental impacts to the lake and ravines associated with the project. Additionally, the project, as approved and partially built, does not include internal cohesiveness, compatibility and spatial integration with the other developed portions of the project. Finally, conservation and preservation features are not protected under the original plan. Accordingly, to state that only the original plan may be reviewed against the ordinance's criteria is to have the County require an absurd or impossible result. That makes the "original plan" an incorrect interpretation of the ordinance as will be discussed below.

The fundamental and guiding principle of all statutory construction is interpreting legislation so as to give effect to legislative intent, regardless of whether the construction varies from the legislation's literal meeting. See Deason v. Florida Dept. of Corrections, 705 So. 2d 1374 (Fla. 1998). When construing a statutory provision (or a local ordinance to which the same standard applies), legislative intent is the polestar that guides the court's inquiry. See McLaughlin v. State, 721 So. 2d 1170 (Fla. 1998); see also Florida Birth-Related Neurological Injury Compensation Assoc. v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997). In construing a statute, the legislative intent should be gleaned from the purpose to be accomplished, as well as the means for accomplishing that purpose. See Beebe v. Richardson, 23 So. 2d 718 (Fla. 1945). Because the primary intent of statutory interpretation is to effectuate legislative intent, if the literal interpretation leads to an unreasonable result plainly at variance with a purpose of the legislation, the court must construe the provision to accomplish the legislative intent. State v. Iacovone; see also Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981). The court has an obligation to interpret legislation in a way to avoid unreasonable, absurd, or ridiculous consequences. See E.M.A. v. Dept. of Children and Families, 795 So. 2d 183 (Fla. 1st DCA 2001); see also State Dept. of Revenue v. Kemper Investors Life Ins. Co., 660 So. 2d 1124 (Fla. 1995).

Additionally, as a general proposition, the standard rules of statutory construction apply to local ordinances and would apply here:

> Our basic function in construing any statute, of course, is to ascertain and give effect to the legislative intent. See State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995); Florida State Racing Comm'n v. McLaughlin, 102 So.2d 574, 575 (Fla. 1958). Certain rules of statutory construction have evolved to guide us in our performance of this function and these rules apply with equal force and effect in the construction of local ordinances. See Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553 (Fla. 1973); Halifax Area Council On Alcoholism v. City of Daytona Beach, 385 So.2d 184, 18 (Fla. 5th DCA 1980); 12 Fla. Jur.2d Counties, Etc. §198 (1959).

Finally, the court is required to resolve all doubts as to interpretation of local ordinance in a manner that, if, at all possible, will render the ordinance valid. See Lee County vs. Lippi, 693 So. 2d 686 (Fla. 2d DCA 1997).

I am attaching copies of many the above-cited cases for your review.

Here, the legislative history of this enactment and the intent behind it is very clear. For example, Board of County Commissioners Agenda Item Request 25, dated March 25, 2003, dealing with this item discusses the background of the proposed ordinance and clearly refers to the proposed use of the site and says that:

> The proposed ordinance has been developed in response to requests from the owners of the Sam's property on North Monroe Street. Their proposal for the site is a redevelopment plan that would include demolition of the existing Sam's building and development of the site with a larger building with supporting stormwater management facilities and parking. The owner has indicated that the proposed redevelopment would comply with all current County Land Development Regulations (site plan review, concurrency management, environmental management, etc.).

> However, the proposed redevelopment would not comply with a non-residential building size limitations established in the Comprehensive Plan for the Lake Protection Future Land Use category and implemented by the County's Land Development Code. Therefore, the owners will need to transfer previously approved development intensity from another component of the conceptually approved Gwynndale PUD.
>
> (emphasis supplied)

The matter was finally voted upon on Tuesday, April 15, 2003, as Item Number 14 under the Public Hearing Agenda. The agenda item for that night picks up the identical language which speaks to a redevelopment plan and to transferring previously approved intensity from another component of the Conceptually Approved PUD.

I spoke at the meeting that night on behalf of Wal-Mart and specifically answered Commissioners Rackleff's and Winchester's questions about a new plan of development which would be both better looking but meet all requirements except for square footage. There was much discussion of the stormwater concerns with the property being in a Lake Protection Zone and the response to why there might be more development was that totally redesigning stormwater on the site, while certainly much better for lake and its environs, is horrendously expensive and one needs to be able to afford it. The Commission agreed and there was no doubt in anyone's mind that we were talking about a new plan of development. Commissioner Winchester even commented that the original plan was ugly in addition to being bad for Lake Jackson. Finally, I followed up the meeting with an e-mail to Commissioner Thaell which again makes it clear there will be a new program which would have to be approved by the Board on the front part of the property that would be better for the lake and the public.

In sum, no one could read any of the documents or attend any of the public hearings and come away with the idea that what we were attempting to revest and build was the old plan. Accordingly, even if someone's reading of the language would allow for that, because that interpretation creates an impossible or absurd result and renders the ordinance meaningless, the legislative intent which clearly spoke to a redevelopment plan should be the proper interpretation.

Issue 3

There has been some concern expressed that the re-vesting of the old plan not be granted prior to the new plan being approved. It should not.

I think the ordinance could be read to allow for the vesting upon a conceptual PUD's or final site plan's approval or whatever end point is decided if approved at the same set of public meetings so that all the technical information, including all the detailed engineering demonstrations, etc., is available to the public, the staff and the Commission when it finally decides. In fact, while Wal-Mart/Sam's was not involved in the ordinance drafting originally, I anticipated that we would seek all approvals the same night in separate public hearings. However, because of the high cost of designing and engineering the entire redesign of the stormwater system and site, Wal-Mart (and any rational developer) wants some indication from the Commission that, assuming certain criteria are met, re-vesting would attach. Accordingly, what I would propose and think the only proper interpretation of the ordinance can be, given our situation, is that any grant of re-vesting by the Commission may only be made subject to or contingent upon approval of the conceptual site plan at a minimum. I say at a minimum because I really think the decision whether it should be conceptual site plan or final site plan or something later really needs to be made by the County environmental staff. The proper motion would include "subject to" so that nothing would vest prior to all the information being made available to the public and presented to and accepted by the Commission.

Issue 4

The final issue I have heard much made of is what will be the requirements that the redesigned site must meet. Obviously, we will work with the neighbors to take care of the neighborhood issues such as lighting, noise, traffic, etc., but the question is, what do subparagraphs a, b, and c of the ordinance actually mean? What ordinances apply? What must be submitted?

I would respectfully suggest that the County environmental and legal staff work together to prepare a detailed list of those criteria which the applicant must meet and what items we would have to submit in order to meet those criteria. In

that way we, the Commission, the neighbors and the community will all understand up front what our target is. In making this suggestion, I don't guarantee that we will agree on that list but simply that your staff should come up with the initial draft and not us. I think this alone would help significantly with the mechanics of this process and keep the level of confusion below where it has been.

If you have any questions, hear of others we need to respond to or need any additional authority of information, please give me a call.

Attachments

cc: Henree Martin
Derrick Cave